

ELIZABETH RIVER RESTORATION TRUST

OPERATING AGREEMENT

This Operating Agreement (the "Agreement") serves as the document for implementing the July 2003 Memorandum of Understanding between The Elizabeth River Project (hereinafter "ERP"), the Commonwealth of Virginia, Department of Environmental Quality (hereinafter "DEQ"), and the U.S. Army Corps of Engineers ("Corps"), Norfolk District (hereinafter "Norfolk District"). This agreement establishes the operating parameters of the Elizabeth River Restoration Trust (hereinafter "Trust"). The Trust, in administering its resources, will serve as a potential mechanism to provide appropriate compensatory mitigation for impacts to aquatic resources authorized by Clean Water Act permits issued by the Norfolk District or Virginia Water Protection permits issued by the State Water Control Board (hereinafter "SWCB") through the DEQ. The Trust will strive to maximize the mitigation benefit to the aquatic environment of the Elizabeth River and the public interest. The Norfolk District, DEQ, and the Trust agree to follow the procedures set forth in this Agreement. For the purposes of this Agreement, the term "aquatic resources" means all waters of the United States subject to Corps regulation and all waters of the state subject to regulation by the Commonwealth, lying within the Elizabeth River watershed. The ERP has demonstrated experience and commitment in restoration of the Elizabeth River.

1. PURPOSE and GOALS

A. The Trust shall serve primarily as a compensatory mitigation tool pursuant to state and federal water laws and regulations. Primary goals of the Trust are to accomplish as many benefits to aquatic resources from compensatory mitigation projects as possible with the funds available and to ensure that the Trust's compensatory mitigation projects result in no net loss of acreage, functions, and values for the types of aquatic resource impacts that were mitigated by payments into the Trust. The Trust will use its resources to offset impacts that cannot be avoided, with the goal of achieving, at a minimum, no net loss, and an offset to permitted project impacts affecting the environmental health of the Elizabeth River watershed. While mitigation funds paid to the Trust as in-lieu fee payments should be sufficient, at a minimum in the aggregate, to offset the impacts for which they are provided, the Elizabeth River Project's goal and the Trust's goal will be to go beyond the minimum to achieve improvements to the Elizabeth River ecosystem. This is in keeping with the Elizabeth River Project's support for "win-win" solutions that benefit both the economy and the ecosystem.

B. As part of the Norfolk District and DEQ permit approval process, compensation for aquatic resources is considered only after avoidance and minimization of impacts to those resources have been considered to the maximum extent practicable. The Trust provides a mechanism of compensation for permits involving impacts to aquatic resources found within the Elizabeth River watershed when off-site compensation for the loss of aquatic resources occasioned by the issuance of permits is deemed to be ecologically preferable and practicable. The primary focus of the Trust will be to provide compensation for permitted impacts to tidal

submerged lands and tidal wetlands; however, contributions from permitted impacts to non-tidal wetlands and streams will be accepted only after a Trust mitigation project involving non-tidal resources has been identified, and the Norfolk District and DEQ are assured the sites are available and the project is viable.

2. RESOURCES

Trust resources shall consist of funds offered and paid as mitigation by permit applicants to compensate for losses to aquatic resources in connection with issuance or verification of Corps or SWCB permits, resolution of unauthorized activities, or other cases as agreed upon by the Norfolk District, DEQ, and the Trust. Federal Operations and Maintenance dredging projects generally will not require compensation. Said funds shall be delivered to the Trust by certified check or electronic transfer to be held in and used by the Trust solely to accomplish mitigation projects as described herein. The Trust hereby agrees to receive and expend said funds in the manner and with the limitations described herein. Funds from other sources, e.g., funds paid as mitigation to aquatic impacts authorized by Virginia Marine Resource Commission permits, may be placed in the Trust and used to augment the goals of this Agreement or the ERP's Watershed Action Plan for the Elizabeth River, but are not subject to the requirements of this Agreement.

3. PROGRAM OPERATION

A. The emphasis of the Trust is on aquatic resource enhancement, restoration, creation, and preservation within the Elizabeth River watershed. The use of this Trust for compensatory mitigation shall occur only after the relevant activity has complied with Norfolk District and SWCB regulations and policies regarding avoidance and minimization of impacts. The Trust, pursuant to the terms of this Agreement, will act as a recipient of compensatory mitigation funds. The Trust shall play no role in the Norfolk District or the SWCB's decision to approve or deny a permit or the determination of whether compensatory mitigation is a necessary condition of any such permit or whether the Trust is an appropriate means of compensatory mitigation for a given permit. The Trust, by written notice to the Norfolk District and DEQ, may decline funds from any actions that it determines are not compatible with ERP's mission or interests in the Elizabeth River. The Norfolk District, in consultation with DEQ, will determine the amount of in-lieu-fee due as compensation from permit impacts, based on factors such as the appropriate level, varying by size and nature of the impacts, which will be necessary in order to accomplish restoration activities that offset the impacts for which funds are provided. For in-lieu-fee payments for impacts to waters not under the jurisdiction of the Corps, the DEQ, in consultation with the Trust, will determine the amount of in-lieu-fee due as compensation from permit impacts.

B. ERP's Watershed Action Plan will be used as a guide for considering mitigation projects.

- (1) The parties to this Agreement will conduct informal staff level consultation on projects prior to the development of proposals to preclude expenditure of resources on projects not likely to proceed.
- (2) Proposals for the following categories of activities following ERP's Watershed Action Plan will be submitted to Norfolk District and SWCB for

review and approval. Thereafter, subsequent to approval, individual activities that implement these proposals are deemed approved under this Agreement, and appropriate for expenditure of mitigation funds, except that projects and activities which require a permit will remain subject to the normal permit application, review, and approval process:

- a. The purchase, protection, restoration, and/or creation of wetlands, mud flats, oyster reefs, and other aquatic resources.
- b. The purchase, protection, and restoration of upland buffers adjacent to aquatic resources.
- c. Restoration or remediation of contaminated river bottoms, including restoration of contaminated uplands located adjacent to, and affecting aquatic resources of, the Elizabeth River.
- d. Reduction of toxic, nutrient laden, or other undesirable storm water runoff.

(3) The following activities outlined in the Elizabeth River Watershed Action Plan may be considered on a case- by- case basis, once a specific proposal is submitted to Norfolk District and SWCB for review and approval, but in general may not meet Norfolk District and Commonwealth of Virginia regulatory requirements for no net loss of aquatic resources. The activities listed below are not high priority objectives for the Trust:

- a. Removal of derelict structures and vessels that produce an environmental detriment or hazard to the Elizabeth River;
- b. Other mitigation projects or activities approved by the Corps and SWCB; and
- c. The purchase of credits from an approved mitigation bank.

(4) Proposals should include, as applicable, a description of the proposed project and site specific plan including location, baseline conditions, size, what types of impacts are being compensated, what kind of compensation can be provided, before and after construction elevations, a schedule for conducting the project, monitoring and maintenance provisions and durations, provisions for protection in perpetuity and performance standards for determining ecological success of mitigation sites. Consideration and approval of projects will be based on factors, which may include, as appropriate, site suitability, appropriateness of proposed compensation to impacts to aquatic resources, benefits to rare or threatened natural resources, the level of threat to the aquatic resources and upland buffers contained in the proposal, ratio of compensation to impacts in the watershed, and an acceptable mitigation and monitoring plan.

C. Implementation and Compliance

(1) The Trust, when accomplishing projects and implementing the ERP's Watershed Action Plan with mitigation funds, shall ensure that the funds are used in

accordance with all Commonwealth and Federal laws and regulations on the use of in-lieu-fee funds, including Section 10, Rivers and Harbors Act and Section 404, Clean Water Act. This includes, but is not limited to:

- a. As required under federal and state guidelines, in-kind compensatory mitigation, when available, shall be deemed the most ecologically preferable form of compensation for project impacts, in most cases. However, out-of-kind compensation opportunities that prove to be more ecologically preferable or practicable may be considered. The funds received, as mitigation from Virginia Water Protection Permits or Norfolk District Corps of Engineers permits, will not be used on projects that do not restore, enhance, preserve or create aquatic resources.
- b. The Trust shall follow federal and the Norfolk District Corps and Virginia DEQ "Recommendations for Wetland Compensation Mitigation" guidelines for ensuring the technical feasibility and likelihood of success of mitigation projects. Preference shall be given to restoration of historic or substantially degraded aquatic resources, as compared to creation or enhancement of aquatic resources, and to the use of well-understood and reliable techniques.
- c. As appropriate, aquatic resources at mitigation sites will be protected in perpetuity with appropriate real estate arrangements such as conservation easements, deed restrictions, or transfer of title to a resource agency or non-profit, and with appropriate long-term management plans. The Norfolk District and DEQ must approve such real estate arrangements.
- d. Performance standards will be set, in consultation with and with the approval of the Norfolk District and the DEQ, for determining the ecological success of the mitigation sites.

(2) The Trust shall provide the Norfolk District and the DEQ with a project's statement on an annual basis that identifies project expenses for the year, and justifies project selection based on consistency with goals and priorities in the ERP's Watershed Action Plan and this agreement. The statement will also itemize impacts that resulted in contributions to the Trust and all mitigation provided by acre, linear foot, or cubic yard. This project statement will be made available to the public on an annual basis by the Norfolk District and DEQ. The Trust will also provide access to information relating to funds, proposals and projects to Norfolk District and DEQ upon reasonable request.

(3) All funds received by the Trust hereunder shall be committed for use for specific projects, and substantial progress shall be made on these projects (examples, even if project is not completed, a feasibility investigation and/or project design should be underway), within three years of the date the funds are received by the Trust. After three years have passed from the date of receipt of specific funds, the Norfolk District may, in consultation with DEQ, at its discretion, direct the transfer of any funds that remain uncommitted or for which substantial progress toward construction has not been shown, to a specific Trust project or to another entity. The Norfolk District, in consultation with DEQ, may grant an extension of these time limits on a case-by-case basis.

(4) Mitigation Project costs are project-related costs necessary to accomplish mitigation and monitoring. Only labor directly related to accomplishing Trust mitigation activities shall be charged to the Trust. Primary considerations in all mitigation project proposals and decisions shall be the demonstrated benefit to the waters of the Commonwealth of Virginia and the most cost effective approach to accomplishment of mitigation projects, in order to maximize the quality, size, number, and scope of mitigation projects, in furtherance of the public's interest in its waterways. All funds shall be used solely for the delivery and accomplishment of compensatory mitigation as described herein, and no funds may be expended except as provided for in this Agreement.

D. Monitoring, Maintenance, Repair and Remediation, and Risk.

(1) Monitoring: The Trust shall include, as part of its project proposal approval requests, plans to monitor the success of mitigation projects. The cost of monitoring shall also be included in the overall project budget. These plans and budgets should cover the entirety of the monitoring period as stated in the plan for each project.

(2) Maintenance, Repair, and Remediation: The Trust is responsible for implementation and success of mitigation proposals and for repair and remediation of projects that do not meet the performance standards and success criteria stated in the project proposals. The Trust will allocate sufficient reserve funds in its project budgets, as approved by Norfolk District and DEQ, to provide for repair and remediation of mitigation projects in the event they do not meet the stated performance standards and success criteria. When monitoring results or inspections indicate that repair and remediation are required, the Trust shall submit a Remediation Plan and budget to the Norfolk District and DEQ for approval. Failing mitigation sites that the Norfolk District and DEQ determine should not be remediated, if purchased with Trust resources, may be sold, and proceeds from the sale shall be returned to the Trust to be used for other mitigation projects pursuant to the Agreement. If Norfolk District and DEQ determine that the Trust does not make substantial progress in repair and remediation of such projects, it may direct transfer of the reserve funds to another entity to achieve the repair and remediation. The Trust shall transfer the funds as directed.

(3) Risk: All work involving refuse, hazardous waste, or other hazardous materials will comply with local, state, and federal laws and regulations regarding such material or work. For such mitigation projects where refuse, hazardous waste, or other hazardous materials are encountered, the Trust shall provide assurances, acceptable to the Norfolk District and DEQ, that the Trust and its funds are protected from liability and risk. These assurances, if applicable, will be submitted as part of the normal mitigation project approval process.

(4) Access for Inspection and Compliance: Norfolk District, DEQ, and their authorized agents shall have the right to enter and go upon any mitigation project site to inspect the site and verify compliance with the terms of this Agreement and the approved

project plans.

E. The Trust shall operate separately from Norfolk District and DEQ/SWCB regulatory actions except as specified in this Agreement.

4. MITIGATION GOALS

A. Regarding compensation ratios for activities impacting wetlands and aquatic systems permitted by the Norfolk District and SWCB, a primary goal is to ensure that there is no net loss of acreage, functions, and values for compensatory mitigation accomplished for impacts to aquatic resources of the type and within the watersheds of those impacts. The most current Norfolk District and SWCB mitigation guidelines (i.e. mitigation ratios, policies, or decisions) or approved functional value methodology shall be utilized to assess and meet this goal. Complementing the “no net loss” goal stated above, the parties shall use their best efforts to accomplish mitigation projects efficiently and at beneficial economies of scale to provide for a significant net gain of aquatic resource functions and values where possible.

B. The Trust shall maintain a running total of impacted and mitigated aquatic resources, by type, for which the Trust was used to mitigate impacts. The Trust shall attempt to use funds accepted from a number of permitted projects collectively so as to maximize the size and/or quality of mitigation projects and thus maximize the benefits for aquatic resource impacts in the Elizabeth River watershed.

5. CONSULTATIONS AND APPROVAL

The Trust shall consult with its Trust Advisory Board, which may consist of Corps, DEQ, and other diverse representatives, in order to determine if the proposal would be considered acceptable mitigation for the estimated project costs. The Trust shall expend funds on projects only after consultation with, and after obtaining approval by the Norfolk District and DEQ, and as provided for by the terms of this Agreement. The Trust shall be responsible for obtaining and complying with all environmental and other required permits associated with implementation of mitigation projects.

6. FINANCIAL CONTROLS

The Trust shall hold any funds collected pursuant to this Agreement in an interest-bearing account, investment instrument, or banking institution so as to earn interest, dividends or provide asset growth while maximizing the safety and preservation of the principal funds in the account. The Trust shall account for the funds so held, in accordance with generally accepted accounting principles, and the account shall be subject to audit by the Norfolk District and DEQ from time to time. The Trust shall provide the Norfolk District with the account statements it receives from all financial institutions holding the funds within 30 days of the date such account statements are issued. Interest earned by the Trust and proceeds from the sale of Trust project lands shall remain with the Trust. At or prior to the time of sale, Trust project lands other than those referenced in Section 3D, shall be placed under perpetual conservation easements or deed restrictions that shall run with the land and not be affected by transfer of the land. In appropriate

circumstances, portions of properties not used for mitigation can be excepted from easements or deed restrictions. Those approved funds in excess of the amount needed for mitigation or restoration projects shall remain with the Trust and shall be disbursed in accordance with this Agreement for other mitigation projects. The Trust shall not be required to give bond or security pursuant to this agreement. The Trust established pursuant to the July 2003 MOU and this operating agreement shall be referred to as the "Trust" for the convenience of the parties, but neither the MOU nor this Agreement shall be deemed to establish or qualify as a trust under state or federal law.

7. ADMINISTRATIVE OVERHEAD AND INTEREST

In lieu of any other fee or commission as may be permitted by law, the Trust shall receive an overhead fee amounting to five percent (5%) of the funds when the funds are deposited. The fee will come from the funds and is deemed to represent and reimburse reasonable overhead and related administrative costs of administering the Trust.

8. GOOD FAITH

The parties hereto agree that both shall exercise their rights and obligations in good faith as contained in this operating agreement.

9. RENEWAL, AMENDMENT, AND TERMINATION

A. This operating agreement may be terminated by any party by giving One Hundred Eighty (180) days written notice to the other parties. Amendments require written approval by the Norfolk District, DEQ, and the Trust. DEQ's approval of, and participation in, this agreement is valid for five years. At the expiration of five years, DEQ may renew its approval of this agreement by executing and signing a document indicating its approval and renewal and the new extended validity date of the agreement. DEQ shall provide a copy of the renewal document to the other signatories to this Agreement at least 180 days before any expiration period.

B. In the event of termination of this Agreement in whole or in part, Trust funds shall be paid as directed by the Norfolk District and DEQ to not more than ten (10) recipients. The Trust shall be permitted to retain funds needed to satisfy legal obligations for approved projects and will also be permitted to retain maintenance funds for the mitigation projects that it has completed for the remainder of the monitoring period for each such project to insure maintenance obligations are met. At the end of any monitoring period, the Trust shall seek disbursement instructions from the Norfolk District and DEQ as to any unexpended funds and shall disburse the funds in accordance with Norfolk District and DEQ instructions.

10. **NOTICE (Add list of contacts for notices)** Official notices to and between the parties to this agreement will be sent to:

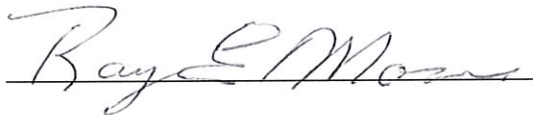
Elizabeth River Restoration Trust
475 Water Street, Suite 103A
Portsmouth, VA 23704

Virginia Department of Environmental Quality
P.O. Box 10009
Richmond, VA 23240

United States Army Corps of Engineers
Elizabeth River Trust Project Manager
803 Front Street
Norfolk, VA 23510-1096

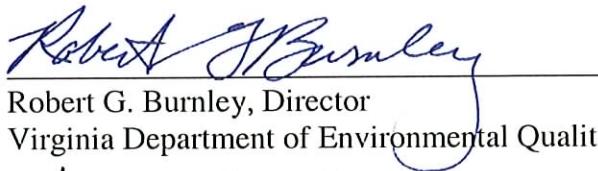
11. **EXECUTION**

This agreement has been duly executed in three duplicate originals on this 7th day of May, 2004.



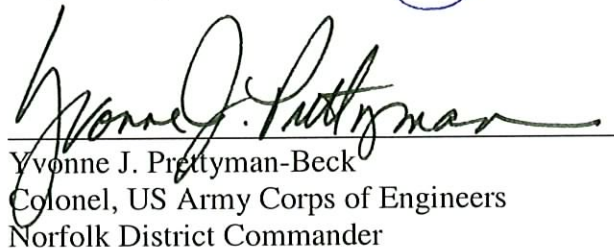
Date 5/7/04

Ray E. Moses, RADM NOAA (Ret.)
Chairman, Elizabeth River Restoration Trust



Robert G. Burnley, Director
Virginia Department of Environmental Quality

Date 5/14/04



Yvonne J. Prettyman-Beck
Colonel, US Army Corps of Engineers
Norfolk District Commander

Date 5/19/04